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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

ROBERT H. MARTIN, *Petitioner*

v.

PHILLIPS PETROLEUM COMPANY, CHEMICAL BANK, NEW YORK TRUST COMPANY, TEXAS SAN JUAN OIL CORPORATION, TENSAS GAS GATHERING CORPORATION, BART DeLAAT and BART DeLAAT AND ASSOCIATES, INC., GAS INDUSTRIES MANAGEMENT CORPORATION and GASOLINE PLANT CONSTRUCTION CORPORATION, *Respondents*

NO. 690

PETITIONER'S REPLY TO RESPONDENTS' OPPOSITION BRIEFS

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I.

Present Posture of the Case

It cannot be seriously denied that Bank[1] and Phillips in combination and conspiracy successfully ousted Martin as a

[1] References to parties are in the same abbreviated form used in the Petition.

potential competitor of Phillips in the Locust Ridge area and deprived him of the value of his option to acquire the Locust Ridge plant and facilities. (Phillips Br. pp. 4, 22; Bank's Br. p. 6)

Nor does it appear that any of the Respondents could seriously challenge the requisite standing of Martin to maintain this action. They have impliedly admitted he had property. A release from Martin and his associate Weiler was later made one of the the two express conditions precedent to Bank, Phillips, Texas San Juan and Jett's going forward with the acquisition of the Locust Ridge properties without Martin.[2]

After Bank had surreptitiously combined with Phillips to replace Martin as operator of the Locust Ridge plant and marketer of its products, Martin's property was recognized in that he was conceded to be entitled to ½ of the remainder after Phillips had extracted its share, an interest such as would be given only to a person with a property interest. It is also admitted that Martin incurred expenses of $10,000 principally in obtaining feasibility studies.[3]

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[2] "This agreement shall not be effective unless the following conditions have been met:

"(a) The Bank and Texas San Juan shall have received a written release from Messrs. Robert H. Martin and John L. Weiler relative to their prior involvement with the optioned property. By 3:00 P.M. March ____, 1961, Bank shall advise Phillips and Jett by telegram that this condition has been met or waived or the agreement is void and Phillips and Jett may proceed in any way they wish independently of the Bank and Texas San Juan." (R. 1521-1522)

[3] Hudson, president of respondent Texas San Juan, reported to Martin after leaving the Adams Petroleum Center meeting between Bank and Phillips that:

". . . Nick [Bailey of Bank] walked me out to the taxi cab and said, "Bill what do you think?" I said well if you want

Respondents make much ado about an advisory letter Judge Hutcheson wrote to District Judge Connally during the initial stages of this lawsuit. However, Respondents fail to reveal the total text of the letter (R. 124) in which Judge Hutcheson clearly recognized Martin's standing to sue and warned against the very action taken by both the District Court and the Court of Appeals.[4]

It thus appears that what respondents are challenging is how much business or property Martin had to be damaged as distinguished from whether or not he had the requisite standing to sue.

Each of the fact issues challenged by respondents is an attempt to show the frailty of Martin's interest. Hence, these fact issues bear on the issue of the extent of injury or damages to petitioner's business or property and not on whether Martin had the requisite status to maintain a lawsuit.

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to do it Nick I'm with you and obviously in the light of what Phillips says it makes no sense at all for the Chemical to go ahead unless they do it with Phillips and he said "Well what is the division of the split?" and I said well, Phillips is going to want half it would strike me that whatever winds up that Texas San Juan should split with Bob Martin—just because—then there was a discussion that what have you contributed to this thing other than about 10 thousand bucks worth of reports this was at some point and they said what he really is, is a finder here, and I said well that isn't what he was in other words with our deal as a finder of the last half of the financing and in my estimation the tough half he was entitled to his 50-50 deal even though we knew he wasn't putting up any money he was nevertheless causing this financing to be arranged for which you earned your half . . ." (R. 1503)

[4] "What I am trying to emphasize is that since the statute created a statutory cause of action which was to be tried like any other cause of action, a court should not get caught in the position of putting himself in the jury box to the extent of determining the case on the pleadings." (R. 125)

This case was instituted as a jury case and petitioner believes that the unquestioned existence of the combination and conspiracy imposes liability as a matter of law on respondents, but the extent of monetary damage resulting from such liability must be factually determined before a trier of facts to ascertain the true worth and extent of the damage to Martin's business or property.

Petitioner has amply demonstrated that there are substantial issues of fact bearing on the injury or damage to Martin's business or property. (Martin's Pet. pp. 20-27) Respondents' briefs support or fortify the existence of such fact issues. (Bank's Br. pp. 5-13; Phillips' Br. pp. 12-14)

II.

"Business or Property"

It is apparent from the foregoing that there are fact issues on the extent of damage to Martin's "business or property." It is also Martin's position that there are sufficient established facts to show as a matter of law that Martin had "business and property" (Martin's Pet. pp. 29-32) which was injured by antitrust violations of respondents (Ibid. 32-41), and that the contrary holdings below are in conflict with decisions of this Court and of other Courts of Appeal as set out in Martin's Petition for Writ of Certiorari (Ibid. 29-41).

Bank's brief argues only the merits of "business or property" and addresses itself not at all to the specific "business or property" grounds urged by Petitioner (Martin's Pet. pp. 28-32) for granting the Writ. The only opposition to those grounds are the limited efforts of Phillips (Phillips' Br. p. 15) to answer only one of the two grounds urged by Martin.

The "business or property" phase of the case might be rested with the Fifth Circuit's recognition that Martin had a "find" which Bank "gave" to Phillips (Martin's Pet., App. A, p. 11), and with Phillips' recognition that Martin had with Bank "a promising business relationship" (Phillips' Br. p. 10). A "find" in this context which Bank "gave" can mean nothing but "property." And "a promising business relationship" is the most Vines had in *Vines v. General Outdoor Advertising Co.*, 171 F.2d 487 (C.A. 2, 1948), and the most that Wescoast had in *Jerrold Electronics Corp. v. Wescoast Broadcasting Co.*, 341 F.2d 653 (C.A. 9, 1965), *cert. den.* 352 U.S. 817 (1965) at the time of the tying violation, and both plaintiffs were found to have property.

But Bank and Phillips are otherwise demonstrably wrong on this as well as other issues. Both respondents say Martin had no business which was injured. This is said despite the unchallenged fact that Martin was in the oil and gas business producing, transporting and marketing gas and doing first stage processing thereof (R. 869-870).[5] He was seeking to make a natural expansion of that business to acquire a small gas processing plant. Respondents would make it appear he was seeking to embark on a strange, new venture. (Phillips' Br. pp. 6-7; Bank's Br. p. 8) Thus respondents, to defeat Martin, would fragment the oil and gas industry into many unbridgable parts. This represents a drastic about face on the part of respondents. The tax loss carry forward

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[5] Records from Bank's unilateral investigation into Martin's background revealed:

> "2—Mr. Martin is evidently highly respected by the major oil companies in this area and is on their so-called 'favored' list. Because of this he is able to get advantageous farm-outs. He has been most active with Tennessee Gas.
>
> "3—I believe that he is technically a very excellent operator.
>
> "We are, of course, very interested in anything which can be done with Texas San Juan and from what we know in this firm I would say he would be a very suitable partner for us." (Zwick Deposition Exhibit PZ-62.1)

which was the "key" to the acquisition of the Locust Ridge properties was based on a loss in off-shore drilling (R. 1001, 1007) and Phillips and Bank are absorbing it in gasoline plant operations. (R. 637, 950, 1000, 1033, 1034, 1108, 1122, 1248, 1358) Under Section 382, Internal Revenue Code 1954, the revenues produced at the gasoline plant could be used to utilize the tax loss incurred in off-shore drilling only if the two are "substantially the same" business.

Martin had a business (R. 869-870) and respondents choked off its normal expansion. Martin had the intention; he had made and was making the preparations; he had the ability to finance the expansion by exchanging a ½ interest in his option property for 100% financing (R. 951, 1221)[6] and Martin could operate the property (R. 702-705, 869-870). No more is required.

Respondents make determined efforts in their briefs to show that Martin had no property. But Martin had a many-faceted property (R. 1221). First there was his business (R. 869-870). Next was his recognized "promising business relationship" with Bank (Phillips' Br. p. 10). Such a "relationship" is property, wrongful interference with which is actionable.[7] Next was his contract and promising

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[6] The acquisition was ultimately financed in exactly this manner, Phillips investing no capital.

[7] **International News Service v. Associated Press**, 248 U.S. 215 (1918); **Bender v. Hearst Corporation**, 263 F.2d 360 (C.A. 2, 1959); **Kansas City, M. & O. R. Co. of Texas v. Bell**, 197 S.W. 322 (Tex. Civ.App. 1917); **Graham v. St. Charles St. R. Co.**, 116 So. 806 (La. 1895). "It should be of no importance to the third party by what happenstance the relation came into existence so long as it is one recognized by law. The relation is more vital and durable than the contract itself and may have protection against a third party beyond the terms of the contract. Thus, even if a contract is unenforceable between the parties because it is a contract at will or because it violates the statute of frauds, a valid relation against third party interference may be established." Green, **Trade Relations under Tort Law**, 47 Va. Law Rev. 559, 563 (1961).

business relationship with Jett. The heart of respondents' attack on Martin's contract and business relationships as property is that all of it was fatally conditional. Their argument on "conditions" will not stand analysis.

It first should be noted that neither respondent has cited one instance where any Bank officer or other employee testified that any specific thing was ever made a condition to Bank's financing the acquisition of the Locust Ridge properties. There are no such references to be cited.

Heavy last-ditch reliance is now placed on Exhibits DM-15 and DM-15A (Bank's Br., App. A, pp. 6a, 7a). Neither respondent thought enough of this strange document intially to have it printed in the record. Respondents' counsel are too numerous and too astute for that to have been an oversight. But the reasons for their not doing so are obvious.

1. This is a document which Martin "think(s)" was delivered by Dr. Judson L. Anderson of Bank to his associate Weiler (Bank's Br., App. A, p. 1a).

2. The document is not signed. If the dictation initials JLA mean Dr. Judson L. Anderson of Bank, he was a technical employee without managerial or official status (R. 980-981). And when Martin sought answers to interrogatories from Bank when Bailey was on leave, Bank stated under oath that "Bailey was *solely* in charge of this matter up to January 16, 1961 . . ." (R. 130). [Emphasis supplied]

3. The claimed "conditions" are not even all on the face of the unsigned document, but apparently there was an unsigned "attached list" (Bank's Br., App. A, p. 3a) to which no reference was made on the face of the unsigned letter. It is impossible to tell whether the introductory paragraph on DM-15 extends to DM-15A. The relationship between the two exhibits is obscure.

4. If the document had been integrated, regular in form and authoritatively signed, it would not have imposed "conditions" simply because its tenor was to "suggest" (Bank's Br., App. A, p. 6a).

5. DM-15 and especially DM-15A show on their faces why no responsible Bank official would have made, under the circumstances, their contents conditions. See especially the contract provisions of items 2-7 of DM-15A.

The simple facts are that negotiations without formulated conditions were being worked out on all fronts looking to a meeting in Houston between Bank and Martin before the option expired to determine whether the option would be exercised (R. 951; Martin's Pet., App. B, pp. 2-3). It was only after Martin on Friday, January 13, 1961, protested strongly Bank's actions in unilaterally bringing in Phillips that Bank and Phillips found it necessary to construct a "condition" with which to "murder" Martin's deal (R. 1502). And it was only after respondent Bank's counsel got in desperate need of some "conditions" on which to defeat Martin's "property" that DM-15 and DM-15A were brought out of the obscurity to which their lack of merit had relegated them.

This conclusion is borne out by many phases of the record. Bank's letter of December 19, 1960 (R. 1456) wherein "Nick" speaks to "Bob" of "our joint enterprises" suggests a cooperative approach to the working out of something of mutual interest, rather than of the more formal approach of "conditions." There appeared to be no concern about unfulfilled conditions when Bailey reported on January 10, 1961, that everything was progressing nicely and that he saw no reason why the option would not be exercised (R. 951; Martin's Pet., App. B, p. 3). It is also obvious from Martin's shocked reaction to Bank's 11th-hour

injection of Phillips into the acquisition that he was not aware of any defeating conditions (R. 1038-1040). Similarly, failure to meet conditions does not appear in any version of the conversation that broke off relations between Martin and Bank (R. 1045-1046, 1413-1416). The record discloses that such problems as there were about Jett's 1/8 override (R. 1177-1178) and expansion of the plant to a *capacity* of 40,000 mcfd (Martin's Pet. pp. 22-23) would have been worked out. There is no evidence to the contrary. Neither Bank nor Phillips is in a position to complain of lack of finalized perfection, if any, when their own disruptive actions diverted and threw turmoil into the last three days before Martin's exclusive option expired. *North Texas Producers' Association v. Young*, 368 F.2d 235, 245 (C.A. 5, 1962), *cert. den.* 372 U.S. 929 (1963).

Absent these phantom "conditions," it is clear that Martin had business and property and that the decision of the Fifth Circuit holding to the contrary is in conflict with decisions of other courts of appeal (Martin's Pet. pp. 29-32).

Respondents, as did the courts below, continue in evaluating Martin's option as property, to ignore the cases of *Strawbridge v. Warfield*, 4 La. 20 (1832); *Packwood v. White*, 7 La. Ann. 31 (New Orleans 1852), and *Pauline v. Hubert*, 14 La. Ann. 161 (New Orleans 1859) which hold that otherwise valid contracts under Article 2440 of the Louisiana Civil Code are enforceable, though oral, if the parties do not object. The record is undisputed that both Jett and Martin honored the oral suboption in question. So if Louisiana law was controlling, which it is not (see *Leh v. General Petroleum Corporation*, 165 F. Supp. 933 (S.D. Cal. 1958); *Cinnamon v. Abner A. Wolf, Inc.*, 215 F. Supp. 833 (E.D. Mich. 1963); *Winckler-Koch Engi-*

neering Co. v. Universal Oil Prod. Co., 100 F. Supp. 15 (S.D.N.Y. 1951); *Taxin v. Food Fair Stores, Inc.*, 181 F. Supp. 181 (E.D. Pa. 1960), aff'd 287 F.2d 448 (C.A. 3, 1961)), it would be no bar to Martin's having property in his option.

III.

Antitrust Violations

A. On Combination in Restraint of Trade (Phillips' Br. pp. 16-23)

Phillips relies on some non-analogous labor cases [*Apex Hosiery Co. v. Leader*, 310 U.S. 469 (1940) and *Hunt v. Crumboch*, 325 U.S. 821 (1945)]; some non-analogous substitution of franchise cases [*Ace Beer Distributors, Inc. v. Kohn, Inc.*, 318 F.2d 283 (C.A. 6), *cert. den.* 375 U.S. 922 (1963); and *Parmelee Transportation Co. v. Keeshin*, 292 F.2d 794 (C.A. 7), *cert. den.* 368 U.S. 944 (1961)]; and a non-analogous political activity case [*Eastern Railroad Presidents' Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961)] to establish the non-sequitur that the combination of non-competitors to thwart entry into the commercial market by a competitor (Martin) of one of the combiners (Phillips) was not a violation of the antitrust laws. The position is untenable on its face, and is refuted by *Radiant Burners, Inc. v. Peoples Gas Light and Coke Co.*, 365 U.S. 656 (1961), where it was held that a combination containing non-competing persons could violate the antitrust laws.

B. On Unlawful Tying (Phillips' Br. pp. 23-25)

The fundamental error here is that Phillips does not distinguish between Bank's imposing, as a condition of making a loan, that Martin obtain an operator and marketer

of certain qualifications and experience, which it could have lawfully done, and in Bank's unilaterally making an agreement with Phillips to operate the plant, market its products and take part of Martin's residual interest and then telling Martin if he got the loan he would have to take these burdensome services. The difference is the difference between a lawful condition and an unlawful tying arrangement.

Phillips is gravely inaccurate in its footnote reference at the bottom of page 24 of its brief. The cited cases do not hold that the loan of money cannot be the tying element in an unlawful tying arrangement under the "antitrust laws." The cases so held only with respect to tying arrangements under Section 3 of the Clayton Act, 15 U.S.C. Sec. 14, because of the unique statutory language in that Section. Our case is under Section 1 of the Sherman Act. (Martin's Pet. pp. 36-37).

C. *On Attempt or Conspiracy to Monopolize (Phillips' Br. 25-29)*

Phillips here ignores the unchallenged fact findings of the trial court on attempt to monopolize (R. 951; Martin's Pet., App. B, p. 3). Phillips is also in error in its unsupported statement that there were six or seven companies (Phillips' Br. p. 25) in the relevant market larger than Phillips (see facts and record references, Martin's Pet., pp. 16-17). Based on the trial court's unchallenged finding, and the record-supported facts, the holding of the lower court on the law issue was clearly in conflict with *Lessig v. Tidewater Oil Co.*, 327 F.2d 459, 474-75 (C.A. 9, 1964), *cert. den.* 377 U.S. 993 (1964). It appears Tidewater sold only about 5% of the gasoline in its marketing area (327 F.2d at p. 468).

D. *On Section 7 Clayton Act Violation (Phillips' Br. pp. 29-31)*

Phillips here continues its approach, actually the only one available to it, of ignoring the facts and the cases set out in Martin's Petition. Phillips makes no attempt to show that the holding of the court below, that Phillips' acquisition did not violate Section 7, was not in conflict with decisions of this court holding that acquisitions in markets less concentrated than the one in question did violate Section 7 as a matter of law (Martin's Pet. pp. 39-40).

IV.

Abuse of Discretion on Discovery (Phillips' Br. pp. 31-33)

Much is made by respondents of the amount of discovery had. Deposition discovery was no doubt lengthened by trying to develop peripherally, with witnesses having failing memories, what probably was disclosed by a few vital documents made at the time of the events they describe and dealing with the heart of respondents' activities. Futile attempts were made by Martin to have such documents produced before the taking of depositions (see record references Martin's Pet., p. 40). Martin believes that the facts eventually obtained entitle him to judgment as a matter of law on the issue of liability, but if the case is to be tried on that issue, or, if not, still on the issue of damages, good cause for production of the documents is obvious.

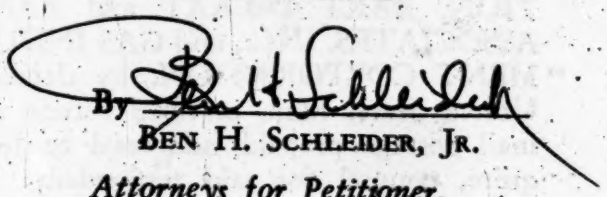
Conclusion

It is clear from Martin's Petition and Respondents' briefs that there are fact issues but that they go only to the damage to Martin's business and property. It is believed to be clear that there is a core of undisputed facts which show as a matter of law that Martin had both business and property; that respondents injured them by combined actions in violation of the antitrust laws; and that the holdings to the contrary below are in conflict with numerous decisions of other courts of appeal and of this court.

Martin, therefore, prays that his Petition for Writ of Certiorari be granted.

Respectfully submitted,

A. A. WHITE
BEN H. SCHLEIDER, JR.
EARL O. LATIMER II

By 
BEN H. SCHLEIDER, JR.

Attorneys for Petitioner,
Robert H. Martin

Certificate of Service

I, BEN H. SCHLEIDER, JR., one of the attorneys for ROBERT H. MARTIN, petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 22 day of November, 1966, I served copies of PETITIONER'S REPLY TO RESPONDENTS' OPPOSITION BRIEFS in the above entitled cause on the several parties thereto, as follows:

1. On respondents PHILLIPS PETROLEUM COMPANY and GASOLINE PLANT CONSTRUCTION CORPORATION, by depositing five (5) copies in the United States Mail, certified return receipt requested, postage prepaid, addressed to Messrs. Leroy Jeffers, Ross N. Sterling, Richard P. Keeton and Harry M. Reasoner, counsel for said respondents, of the law firm of Vinson, Elkins, Weems and Searls, First City National Bank Building, Houston, Texas 77002.

2. On respondents CHEMICAL BANK NEW YORK TRUST COMPANY, TEXAS SAN JUAN OIL CORPORATION, TENSAS GAS GATHERING CORPORATION, BART DeLAAT and BART DeLAAT AND ASSOCIATES, INC., and GAS INDUSTRIES MANAGEMENT CORPORATION, by depositing a copy in the United States Mail, certified return receipt requested, air mail postage prepaid, addressed to John W. Barnum, Esquire, counsel for said respondents, of the law firm of Cravath, Swaine & Moore, 1 Chase Manhattan Plaza, New York, New York 10005.

DATED: At Houston, Texas, November 22, 1966.

Ben H. Schleider

BEN H. SCHLEIDER, JR.

Attorney for Petitioner,
Robert H. Martin